

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MATTHEW BARCUS,

Petitioner,

Case No. 3:11-cv-00857-MMD-WGC

ORDER

v.

GREG SMITH, et al.,

Respondents.

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which petitioner, a state prisoner, is proceeding *pro se*. Before the Court is respondents' motion to dismiss (dkt. no. 18). Petitioner has opposed the motion (dkt. no. 25), and respondents have replied (dkt. no. 26). Petitioner has also filed a second motion for appointment of counsel (dkt. no. 24), to which the Court turns first.

**I. PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL**

On September 17, 2012, petitioner filed a second motion for appointment of counsel (dkt. no. 24). As the Court has discussed before, there is no constitutional right to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9<sup>th</sup> Cir.1993). The decision to appoint counsel is generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9<sup>th</sup> Cir.1986), *cert. denied*, 481 U.S. 1023 (1987); *Bashor v. Risley*, 730 F.2d

1 1228, 1234 (9<sup>th</sup> Cir.), *cert. denied*, 469 U.S. 838 (1984). However, counsel must be  
 2 appointed if the complexities of the case are such that denial of counsel would amount  
 3 to a denial of due process, and where the petitioner is a person of such limited  
 4 education as to be incapable of fairly presenting his claims. See *Chaney*, 801 F.2d at  
 5 1196; see also *Hawkins v. Bennett*, 423 F.2d 948 (8<sup>th</sup> Cir.1970). As this Court  
 6 concluded earlier, the petition in this action appears sufficiently clear in presenting the  
 7 issues that petitioner wishes to raise, and it does not appear that counsel is justified.  
 8 Petitioner also requests an evidentiary hearing. However, he provides no argument  
 9 whatsoever as to why an evidentiary hearing is warranted. Thus, petitioner's motion for  
 10 appointment of counsel and for an evidentiary hearing is denied.

## 11 **II. PROCEDURAL HISTORY AND BACKGROUND**

12 Petitioner was convicted, pursuant to a jury verdict, of one count of possession of  
 13 burglary tools and one count of possession of a stolen motor vehicle and adjudicated a  
 14 habitual criminal (exhibits to motion to dismiss, dkt. no. 18, exh. 41).<sup>1</sup> The district court  
 15 sentenced petitioner to 12 months incarceration for possession of burglary tools and  
 16 also adjudicated him a habitual criminal and sentenced him to a concurrent term of 25  
 17 years with parole eligibility after 10 years (*id.*).

18 Petitioner filed a direct appeal to the Nevada Supreme Court (exh. 54).  
 19 Petitioner relied on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and argued that his  
 20 Fifth, Sixth, and Fourteenth Amendment rights to due process and a jury trial were  
 21 violated because the court made a determination of facts, not found beyond a  
 22 reasonable doubt by a jury, and used that determination to sentence him to an  
 23 increased penalty (*id.* at 7). The Nevada Supreme Court affirmed the conviction on  
 24 June 8, 2007 (exh. 56). Remittitur issued on July 5, 2007 (exh. 58).

25 On June 5, 2008, petitioner filed a state postconviction petition for a writ of  
 26 habeas corpus (exh. 63). On July 31, 2009, through newly appointed counsel,

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27 28 <sup>1</sup>All exhibits referenced in this order are exhibits to respondents' motion to  
 dismiss (dkt. no. 18) and may be found at dkt. nos. 19-22.

1 petitioner filed what the state district court determined was a superseding state petition  
 2 (exh. 67). The state district court denied the majority of the petition and held an  
 3 evidentiary hearing on the issues of restitution and ineffective assistance of appellate  
 4 counsel (exhs. 76, 86, 87). The state district court then granted petitioner's claim of  
 5 ineffective assistance of trial counsel regarding the restitution and vacated the  
 6 restitution award in the judgment of conviction (exh. 88). On November 18, 2011, the  
 7 Nevada Supreme Court affirmed the state court determination (exh. 104).

8 Petitioner dispatched this federal petition for writ of habeas corpus on November  
 9 22, 2011 (dkt. no. 7). Respondents argue that grounds 1 through 7 are unexhausted  
 10 (dkt. no. 18). They also argue that several grounds should be dismissed as conclusory  
 11 or because they are not cognizable in a federal habeas action (*id.*).

12 **III. LEGAL STANDARDS**

13 **A. Exhaustion**

14 A federal court will not grant a state prisoner's petition for habeas relief until the  
 15 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*  
*Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state  
 16 courts a fair opportunity to act on each of his claims before he presents those claims in  
 17 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also  
 18 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
 19 petitioner has given the highest available state court the opportunity to consider the  
 20 claim through direct appeal or state collateral review proceedings. See *Casey v. Moore*,  
 21 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir.  
 22 1981).

23 A habeas petitioner must "present the state courts with the same claim he urges  
 24 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal  
 25 constitutional implications of a claim, not just issues of state law, must have been raised  
 26 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481  
 27 (D. Nev. 1988) (*citing Picard*, 404 U.S. at 276). To achieve exhaustion, the state court  
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1 must be “alerted to the fact that the prisoner [is] asserting claims under the United  
 2 States Constitution” and given the opportunity to correct alleged violations of the  
 3 prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v.*  
 4 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b)  
 5 “provides a simple and clear instruction to potential litigants: before you bring any claims  
 6 to federal court, be sure that you first have taken each one to state court.” *Jiminez v.*  
 7 *Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (*quoting Rose v. Lundy*, 455 U.S. 509, 520  
 8 (1982)). “[G]eneral appeals to broad constitutional principles, such as due process,  
 9 equal protection, and the right to a fair trial, are insufficient to establish exhaustion.”  
 10 *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted). However,  
 11 citation to state caselaw that applies federal constitutional principles will suffice.  
 12 *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

13 A claim is not exhausted unless the petitioner has presented to the state court  
 14 the same operative facts and legal theory upon which his federal habeas claim is based.  
 15 *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The  
 16 exhaustion requirement is not met when the petitioner presents to the federal court facts  
 17 or evidence which place the claim in a significantly different posture than it was in the  
 18 state courts, or where different facts are presented at the federal level to support the  
 19 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge*  
 20 *v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,  
 21 458 (D. Nev. 1984).

## 22           **B.     Conclusory Claims**

23           In federal habeas petitions, notice pleading is not sufficient. Mere conclusions of  
 24 violations of federal rights without specifics do not state a basis for habeas corpus relief.  
 25 *Mayle v. Felix*, 545 U.S. 644, 649 (2005); *O’Bremski v. Maass*, 915 F.2d 418, 420 (9th  
 26 Cir. 1990); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995). Conclusory allegations  
 27 not supported by specific facts are subject to summary dismissal. *Blackledge v. Allison*,  
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1 431 U.S. 63, 74 (1977). *Pro se* pleadings, however, must be liberally construed.  
 2 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

3           **C. Non-cognizability and Fourth Amendment Claims**

4           Allegations of violations of a petitioner's Fourth Amendment rights are not  
 5 cognizable in federal habeas corpus actions provided that the petitioner has a "full and  
 6 fair" opportunity to litigate these claims in state court. *Stone v. Powell*, 428 U.S. 465,  
 7 481 (1976); *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9<sup>th</sup> Cir. 1996). The relevant  
 8 inquiry is whether the petitioner had the opportunity to litigate his claim, not whether he  
 9 did in fact do so or even whether the claim was correctly decided. *Id.* A petitioner  
 10 seeking habeas relief based on a state court's failure to exclude evidence on Fourth  
 11 Amendment grounds must affirmatively demonstrate that the state court did not afford  
 12 him an adequate opportunity to litigate his Fourth Amendment claims. *Woolery v.*  
 13 *Arave*, 8 F.3d 1325, 1326 (9<sup>th</sup> Cir. 1993).

14           **IV. INSTANT PETITION**

15           **A. Ground 1**

16           In ground 1 of the federal petition, petitioner alleges violations of his Fourth, Sixth  
 17 and Fourteenth Amendment rights against unreasonable searches and seizures, and to  
 18 due process and equal protection (dkt. no. 7 at 7-8). He argues that he was arrested for  
 19 a felony without a warrant on May 28, 2005, but was not brought before a magistrate for  
 20 56 hours after his arrest, in violation of *Gerstein v. Pugh*, 95 S.Ct. 854 (1985) (*id.* at 7).  
 21 Respondents are correct that petitioner failed to raise this claim in either his direct  
 22 appeal or his appeal of the district court's denial in part of his state postconviction  
 23 petition (Exhs. 54, 97). Accordingly, ground 1 is unexhausted.

24           To the extent that petitioner argues that his Fourth Amendment rights were  
 25 violated, respondents correctly argue that petitioner has not affirmatively demonstrated  
 26 that the state court did not afford him an adequate opportunity to litigate his Fourth  
 27 Amendment claims. *Stone*, 428 U.S. at 481; *Woolery*, 8 F.3d at 1326. And indeed,  
 28 state law provides a mechanism to challenge the validity of search warrants, etc. See

1 NRS 179.085. Here, petitioner had the opportunity to litigate this claim, and in fact filed  
 2 a motion to suppress other evidence obtained from inside the vehicle (exh. 25).  
 3 Accordingly, the portion of ground 1 that alleges violations of petitioner's Fourth  
 4 Amendment rights is dismissed as not cognizable in a federal habeas corpus  
 5 proceeding.

6       **B. Ground 2**

7       In ground 2, petitioner alleges violations of his Fifth and Fourteenth Amendment  
 8 rights to due process and equal protection. He asserts that the prosecutor engaged in  
 9 misconduct when petitioner's preliminary hearings were continued over and over and  
 10 that the prosecutor refused to provide discovery for over six weeks. Petitioner also  
 11 alleges prosecutorial misconduct when the prosecutor allowed the victim to lie on the  
 12 stand, and when at sentencing the prosecutor made statements about untested  
 13 statistics on unproved car thefts attributed to petitioner, and read from a detective's  
 14 statements in another case (dkt. no. 7 at 9-12).

15       Respondents argue that this ground is unexhausted (dkt. no. 18 at 12-13).  
 16 Respondents are correct that petitioner failed to raise this portion of ground 2: that the  
 17 prosecutor committed misconduct when the preliminary hearings were continued and  
 18 when he refused to provide discovery for over six weeks. Moreover, this portion of the  
 19 claim is conclusory; petitioner fails to set forth specifically what discovery was withheld.  
 20 Accordingly, this portion of ground 2 is dismissed as conclusory.

21       Respondents are also correct that petitioner failed to raise the remaining claims  
 22 set forth here in ground 2 in either his direct appeal or his appeal of the denial of his  
 23 state postconviction habeas petition (ex's 54, 97). Accordingly, the claims of  
 24 prosecutorial misconduct when the prosecutor allowed the victim to lie on the stand, and  
 25 when at sentencing the prosecutor made statements about untested statistics on

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1 unproved car thefts attributed to petitioner, and read from a detective's statements in  
 2 another case are unexhausted.<sup>2</sup>

3       **C. Ground 3**

4       Petitioner alleges violations of his Fifth, Sixth and Fourteenth Amendment rights  
 5 to due process, equal protection and effective assistance of counsel. He claims the  
 6 following: counsel was ineffective by failing to be prepared at the preliminary hearing.  
 7 Petitioner had the right to cross examine all witnesses, present evidence and testify.  
 8 Counsel failed to object to hearsay at the preliminary hearing (apparently in violation of  
 9 his rights under the Confrontation Clause). Counsel failed to investigate the value of the  
 10 vehicle, which was less than \$2,500.00. Counsel failed to show that the victim "acted  
 11 like a vigilante in trying to obtain the vehicle." Counsel failed to move to exclude  
 12 evidence that petitioner wielded a knife to get the victim to "back off" when he  
 13 confronted petitioner, even though the related charge was dismissed at the preliminary  
 14 hearing. Counsel failed to object at trial, failed to present evidence that the victim  
 15 searched the vehicle before police arrived, and failed to object to a jury instruction that  
 16 did not cite the statute pursuant to which petitioner was found guilty. Counsel did not  
 17 allow petitioner to testify (exh. 7 at 13-14). Respondents argue that ground 3 is  
 18 unexhausted (dkt. no. 18 at 13-15).

19       Petitioner raised the following as ground 1 in his appeal of the state district court  
 20 denial of his superseding state postconviction habeas petition: that his Sixth  
 21 Amendment right to effective assistance of counsel was violated when his counsel failed  
 22 to be prepared at the preliminary hearing to present evidence of the true value of the  
 23 stolen vehicle (exh. 97 at 5). Accordingly, this portion of ground 3 is exhausted.  
 24 Petitioner did not raise any other ground 3 claims in his direct appeal or his appeal of

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25       <sup>2</sup>The Court notes that petitioner raised ineffective assistance of counsel claims  
 26 regarding the failure to object to the prosecutor providing prejudicial hearsay not in  
 27 evidence at the sentencing hearing in his appeal of the denial of his state postconviction  
 28 petition (exh. 97 at 7-9). However, a substantive claim subsumed within a claim of  
 ineffective assistance of counsel is not exhausted and is not preserved for federal  
 habeas review. *Rose v. Palmateer*, 395 F.3d 1108, 1111-1112 (9<sup>th</sup> Cir. 2005).

1 the denial of his supplemental state postconviction petition. Thus, all other claims set  
2 forth in ground 3 are unexhausted.

3 The following claims in ground 3 are dismissed as conclusory, with the Court's  
4 reasoning following each:

5 (1) counsel was ineffective and not prepared for the preliminary  
6 hearing because petitioner had a right to cross-examine all witnesses – petitioner fails  
7 to identify which witnesses he was unable to cross-examine;

8 (2) counsel was ineffective for not allowing petitioner to testify –  
9 petitioner fails to allege what his testimony would have been and how that would have  
10 affected the trial outcome;

11 (3) counsel was ineffective for not objecting and not presenting the  
12 facts regarding the victim's search of the vehicle before police arrived – petitioner fails  
13 to allege what those facts are, and how or why he was prejudiced;

14 (4) counsel was ineffective for conducting a poor cross-examination –  
15 petitioner fails to specify who was being cross-examined, what testimony counsel  
16 should have elicited and how that would have affected the outcome;

17 (5) counsel was ineffective for not objecting to a jury instruction that did  
18 not include the statute pursuant to which the jury found him guilty – petitioner fails to  
19 specify to which statute he refers or how citation to it would have affected the outcome;

20 (6) counsel was ineffective by allowing the jury to be confused, not  
21 clearing up multiple issues and not allowing petitioner to take the stand to give his side  
22 of events – petitioner fails to specify what confusing issues counsel failed to clarify, what  
23 testimony petitioner would have provided and how that would have affected the  
24 outcome.

25 **D. Ground 4 and Grounds 4 and 5 of Statement of Additional Claims**

26 Petitioner alleges violations of his Fifth and Fourteenth Amendment rights to due  
27 process and equal protection when the same judge that had presided over other of  
28 petitioner's felony cases presided over this matter as well (dkt. no. 7 at 15-16). He

1 claims that he has appeared before the same judge “time and again” between 1992 and  
 2 2005 (*id.* at 15). Petitioner contends that the judge should have *sua sponte* recused  
 3 himself, that he could not get a fair trial and that the judge violated the Nevada Code of  
 4 Judicial Conduct (*id.* at 15-16). Respondents are correct that this portion of ground 4  
 5 has not been presented to the Nevada Supreme Court, either in direct appeal or  
 6 postconviction habeas proceedings. Accordingly, this portion of ground 4 is  
 7 unexhausted.

8           Respondents fail to address petitioner’s Statement of Additional Claims (dkt. no.  
 9 10), but petitioner adds in grounds 4 and 5 of the Statement of Additional Claims that  
 10 his appellate counsel was ineffective for failing to appeal the court’s use of the stale and  
 11 non-violent convictions to enhance his sentence as a habitual criminal as an abuse of  
 12 judicial discretion and for failing to appeal the improper and highly prejudicial  
 13 admissions of hearsay testimony offered by the prosecutor at sentencing (*id.* at 3-5).  
 14 This claim is raised as ground 4 in petitioner’s appeal of the denial of his state  
 15 postconviction petition (exh. 97 at 8-9) and therefore is exhausted.

16           **E. Ground 5**

17           Petitioner alleges violations of his Fifth and Fourteenth Amendment rights to due  
 18 process and equal protection, his Sixth Amendment right to a jury trial and his Eighth  
 19 Amendment right to be free from cruel and unusual punishment when the judge  
 20 sentenced him as a habitual criminal (dkt. no. 7 at 17). Petitioner contends that he was  
 21 entitled to a jury finding based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that his  
 22 first conviction in 1992 was stale and trivial and that none of his prior crimes was violent.

23           In his direct appeal, petitioner relied on *Apprendi* and argued that his rights to  
 24 due process and a jury trial under the Fifth, Sixth and Fourteenth Amendments were  
 25 violated because the court made a determination of facts, not found to be true beyond a  
 26 reasonable doubt by a jury, and used that determination to sentence petitioner to an  
 27 increased penalty (exh. 54 at 7). Accordingly, this portion of ground 5 is exhausted.

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1            Respondents are correct that the portion of ground 5 that presents equal  
2 protection claims and claims that petitioner's Eighth Amendment right to be free from  
3 cruel and unusual punishment were violated are unexhausted.

4            **F. Ground 6**

5            Petitioner alleges violations of his Fifth Amendment right to due process and to  
6 be free from double jeopardy and his Fourteenth Amendment right to equal protection  
7 because he was sentenced twice for the same crime. He states that he was sentenced  
8 to 12-48 months by jury verdict and then to 10-25 years for the same verdict.  
9 Respondents are correct that petitioner failed to raise this claim either in his direct  
10 appeal or in his appeal of the denial of his state postconviction habeas petition to the  
11 Nevada Supreme Court. Accordingly, ground 6 is unexhausted.

12            **G. Ground 7**

13            Petitioner alleges violations of his Sixth Amendment right to effective assistance  
14 of counsel and his Fourteenth Amendment right to equal protection. He claims the  
15 following: his appellate counsel failed to communicate and discuss the appeals process  
16 with him and failed to raise substantial and meritorious issues in his direct appeal.  
17 Counsel was ineffective for failing to raise grounds 1-4 and 6 of this federal petition.

18            The only portion of ground 7 that is exhausted is petitioner's claim that his  
19 appellate counsel was ineffective for failing to appeal the trial court's use of stale and  
20 non-violent convictions to enhance his sentence as a habitual criminal as an abuse of  
21 discretion and for failing to appeal the improper and prejudicial hearsay testimony  
22 offered by the prosecutor at sentencing (exh. 97 at 8-9). However, this claim is already  
23 raised in grounds 4 and 5 of the Statement of Additional Claims (see discussion of  
24 ground 4, *infra*). Accordingly, this portion of ground 7 is dismissed as duplicative. The  
25 rest of the claims in ground 7 are unexhausted.

26            **V. PETITIONER'S OPTIONS REGARDING UNEXHAUSTED CLAIMS**

27            A federal court may not entertain a habeas petition unless the petitioner has  
28 exhausted available and adequate state court remedies with respect to all claims in the

1 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both  
 2 exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the  
 3 Court finds that some claims are exhausted, some claims are unexhausted, and that  
 4 some claims are subject to dismissal as either conclusory or not cognizable in federal  
 5 habeas corpus. Because the Court finds that the petition is a “mixed petition,”  
 6 containing both exhausted and unexhausted claims, petitioner has these options:

- 7       1. He may submit a sworn declaration voluntarily abandoning the  
       8 unexhausted claims in his federal habeas petition, and proceed  
       only on the exhausted claim;
- 9       2. He may return to state court to exhaust his unexhausted claim, in  
       10 which case his federal habeas petition will be denied without  
           prejudice; or
- 11      3. He may file a motion asking this Court to stay and abey his  
       12 exhausted federal habeas claims while he returns to state court to  
           exhaust his unexhausted claim.

13 With respect to the third option, a district court has discretion to stay a petition  
 14 that it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005).

15 The *Rhines* Court stated:

16       [S]tay and abeyance should be available only in limited  
 17 circumstances. Because granting a stay effectively excuses a petitioner’s  
 18 failure to present his claims first to the state courts, stay and abeyance is  
 19 only appropriate when the district court determines there was good cause  
 20 for the petitioner’s failure to exhaust his claims first in state court.  
 21 Moreover, even if a petitioner had good cause for that failure, the district  
 22 court would abuse its discretion if it were to grant him a stay when his  
 23 unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2)  
 24 (“An application for a writ of habeas corpus may be denied on the merits,  
 25 notwithstanding the failure of the applicant to exhaust the remedies  
 26 available in the courts of the State”).

27 *Rhines*, 544 U.S. at 277.

28 Accordingly, petitioner would be required to show good cause for his failure to  
 29 exhaust his unexhausted claims in state court, and to present argument regarding the  
 30 question whether or not his unexhausted claims are plainly meritless. Respondent  
 31 would then be granted an opportunity to respond, and petitioner to reply.

32 Petitioner’s failure to choose any of the three options listed above, or seek other  
 33 appropriate relief from this Court, will result in his federal habeas petition being

1 dismissed. Petitioner is advised to familiarize himself with the limitations periods for  
2 filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations  
3 periods may have a direct and substantial effect on whatever choice he makes  
4 regarding his petition.

5 **VI. CONCLUSION**

6 IT IS THEREFORE ORDERED that petitioner's motion for appointment of  
7 counsel (dkt. no. 24) is DENIED.

8 IT IS FURTHER ORDERED that respondents' motion to dismiss the petition (dkt.  
9 no. 18) is GRANTED in part and DENIED in part as follows:

10 1. The portion of ground 1 that alleges violations of petitioner's Fourth  
11 Amendment rights is DISMISSED as not cognizable. The remaining claims in ground 1  
12 are unexhausted.

13 2. The portion of ground 2 that alleges that the prosecutor committed  
14 misconduct when the preliminary hearings were continued and when he refused to  
15 provide discovery for over six weeks is DISMISSED as conclusory. The remaining  
16 claims in ground 2 are unexhausted.

17 3. The claim in ground 3 that petitioner's Sixth Amendment right to effective  
18 assistance of counsel was violated when his counsel failed to be prepared at the  
19 preliminary hearing to present evidence of the true value of the stolen vehicle is  
20 exhausted. The following claims in ground 3 are DISMISSED as conclusory:

21 (a) counsel was ineffective and not prepared for the preliminary  
22 hearing because petitioner had a right to cross-examine all witnesses;

23 (b) counsel was ineffective by not allowing petitioner to testify;

24 (c) counsel was ineffective by not objecting and not presenting the  
25 facts regarding the victim's search of the vehicle before police arrived;

26 (d) counsel was ineffective by conducting a poor cross-examination;

27 (e) counsel was ineffective by not objecting to a jury instruction that did  
28 not include the statute pursuant to which the jury found him guilty;

(f) counsel was ineffective by allowing the jury to be confused, not clearing up multiple issues and not allowing petitioner to take the stand to give his side of events.

The remaining claims in ground 3 are unexhausted.

#### 4. Ground 4 is unexhausted.

5. The portion of grounds 4 and 5 of the Statement of Additional Claims that alleges that petitioner's appellate counsel was ineffective for failing to appeal the court's use of the stale and non-violent convictions to enhance his sentence as a habitual criminal as an abuse of judicial discretion and for failing to appeal the improper and highly prejudicial admissions of hearsay testimony offered by the prosecutor at sentencing is exhausted.

6. The claim in ground 5 that petitioner's rights to due process and a jury trial under the Fifth, Sixth and Fourteenth Amendments were violated because the court made a determination of facts, not found to be true beyond a reasonable doubt by a jury, and used that determination to sentence petitioner to an increased penalty is exhausted. The remaining claims in ground 5 are unexhausted.

## 7. Ground 6 is unexhausted.

8. Petitioner's claim in ground 7 that his appellate counsel was ineffective for failing to appeal the trial court's use of stale and non-violent convictions to enhance his sentence as a habitual criminal as an abuse of discretion and for failing to appeal the improper and prejudicial hearsay testimony offered by the prosecutor at sentencing is DISMISSED as duplicative. The remaining claims in ground 7 are unexhausted.

IT IS FURTHER ORDERED that petitioner shall have thirty (30) days to either:  
(1) inform this Court in a sworn declaration that he wishes to formally and forever abandon the unexhausted grounds for relief in his federal habeas petition and proceed on the exhausted ground; or (2) inform this Court in a sworn declaration that he wishes to dismiss this petition without prejudice in order to return to state court to exhaust his unexhausted claims; or (3) file a motion for a stay and abeyance, asking this Court to

1 hold his exhausted claim in abeyance while he returns to state court to exhaust his  
2 unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or  
3 seek other appropriate relief, respondents may respond to such motion as provided in  
4 Local Rule 7-2.

5 IT IS FURTHER ORDERED that if petitioner elects to abandon his unexhausted  
6 grounds, respondents shall have thirty (30) days from the date petitioner serves his  
7 declaration of abandonment in which to file an answer to petitioner's remaining grounds  
8 for relief. The answer shall contain all substantive and procedural arguments as to all  
9 surviving grounds of the petition, and shall comply with Rule 5 of the Rules Governing  
10 Proceedings in the United States District Courts under 28 U.S.C. §2254.

11 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days following  
12 service of respondents' answer in which to file a reply.

13 IT IS FURTHER ORDERED that if petitioner fails to respond to this order within  
14 the time permitted, this case may be dismissed.

15  
16 DATED THIS 24<sup>th</sup> day of May 2013.

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20 MIRANDA M. DU  
21 UNITED STATES DISTRICT JUDGE  
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